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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

PETITIONER'S BRIEF IN CONNECTION WITH THE STAY OF MANDATE.

JAMES J. MAYFIELD
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GEORGE A. LEMAISTRE
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BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

PETITIONER'S BRIEF IN CONNECTION WITH THE STAY OF MANDATE.

In its order granting Petitioner's application for a stay of mandate, this Court granted the requested stay and provided that oral argument, scheduled for March 31, 1952, should be addressed both to the merits of the case and to the stay. Accordingly, this Brief is submitted to the Court, in connection with the stay of mandate which the Court granted on March 24. Simultaneously, a Brief on the merits is being submitted.

The Application for Stay in this matter was filed on March 10, and is attached hereto as Appendix "A". Peti-

tioner's Reply to Respondent's Objection to the Application for Stay was filed on March 17, and is attached hereto as Appendix "B". These were the two documents filed by Petitioner that were before the Court at the time the stay was granted. In addition, there is attached hereto, as Appendix "C", the document which Petitioner filed in opposition to Respondent's Motion to Vacate or Modify the Stay granted by the Court. Petitioner filed this latter document on March 25, and on that same date the Court denied Respondent's Motion to Vacate or Modify the Stay.

Under the circumstances referred to above, and as discussed in greater detail in the appendices hereto, it is submitted that the stay which the Court granted herein on March 24 was properly granted, and should not now be vacated or modified.

In appraising the Court's stay order, a brief timetable of the significant dates with respect to the forthcoming Alabama Primary election is appropriate.

Under the various provisions of Title 17 of the Alabama Code, this year's timetable for Alabama's election works out as follows:

1. The first primary is to be held on May 6, 1952. (Title 17, Alabama Code, Section 340.)

2. The second, or run-off primary, is to be held on June 3. (Title 17, Alabama Code, Section 340.)

3. Any subsequent special primaries that may be necessary are to be held "on such day as the governor may direct." (Title 17, Alabama Code, Section 216.)

4. If the result of the May 6 primary is contested (and a single qualified voter is permitted to contest such a primary), the Chairman of the State Democratic Executive Committee is empowered to call a meeting of the Executive Committee in order to decide such contest, and a new primary is authorized to be held in the event the contest cannot be decided by the Executive

Committee. (Title 17, Alabama Code, Section 374, Section 384, Section 386, and Section 388.)

5. Wholly aside from the possibility of special primaries as referred to above, the significant dates with respect to the May 6 primary can be summarized as follows:

(a) On or before March 1, each candidate desiring to run in the Democratic primary was required to submit his name to the Chairman of the Democratic Executive Committee. (Title 17, Alabama Code, Section 348.)

(b) On or before March 27, the Chairman of the Democratic Executive Committee was required to certify to the Secretary of State the names of all qualified candidates in the Democratic Primary. (Title 17, Alabama Code, Section 344.)

(c) On or before April 6, the Secretary of State is to notify the Probate Judges of the 67 counties in Alabama of the qualified candidates of all parties, in order that the Probate Judges may have the ballots printed. (Title 17, Alabama Code, Section 344.)

(d) On or before April 16, any candidate who has previously qualified, and who wishes his name omitted from the ballot, must notify the Probate Judges of the 67 counties, in order that his name may be omitted from the ballot when the actual printing of the ballots takes place. (Title 17, Alabama Code, Section 148.)*

(e) On or before May 3, the Probate Judge in each of the 67 counties in Alabama must deliver "election supplies and lists to the sheriff of the county." (Title 17, Alabama Code, Section 354.)

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* This Section of Title 17, as well as all other Sections, applies to primary elections as well as general elections, pursuant to Section 1 and Section 339 of Title 17.

(f) On or before 7:30 a.m. on May 6, the sheriff of each county must deliver such election supplies to the polling places in the county. (Title 17, Alabama Code, Section 354.)

As this statutory timetable clearly shows, there is no need to vacate or modify the stay order which the Court has granted in order to protect the Respondent against irreparable injury. As Section 148 of Title 17 makes clear, in no event will the actual printing of ballots begin prior to April 16. At least until April 16, therefore, the stay order does not prejudice Respondent in any way. A decision on the merits by that date will prevent any possibility of irreparable injury to Respondent. With respect to Petitioner, the Court's action in granting the stay constituted recognition of the grave injury which Petitioner would have sustained, if the stay had not been granted. The same reasons that led to the need for the stay, as set out in Appendix "A" hereto, continue to apply today, and will continue to apply throughout the pendency of this case.

In view of the statutory provisions enacted by the Alabama legislature, as referred to above, and in view of the timetable for the forthcoming Alabama primary elections, as summarized in this Brief, it is submitted that this Court acted properly in granting a Stay in this case, and it is further submitted that this Stay should not be vacated or modified.

Respectfully submitted,

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APPENDIX "A".

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

Application for Stay.

Ben F. Ray, Petitioner herein, prays that the judgment entered in this cause on February 29, 1952, by the Supreme Court of Alabama, affirming the judgment entered in this cause by the Circuit Court of Jefferson County, Alabama, be stayed pending the final determination of the cause by the Supreme Court of the United States.

1. *Nature of the Case.* The Supreme Court of Alabama has held, in this case, that a procedure for qualifying candidates for Presidential elector, established as provided by state law, is unconstitutional under Article II, Section 1 and the Twelfth Amendment to the United States Constitution. Specifically, the Court held the state procedure unconstitutional because this procedure requires a candidate for Presidential elector on the Democratic ticket to

pledge, as a condition precedent to running on the Democratic ticket, that he will support for President and Vice-President the candidates nominated by the National Convention of the Democratic Party.* The important Federal Constitutional issue at stake in this case was described as follows by the Supreme Court of Alabama, in its opinion below: "The question is a federal one, and there has been no authoritative pronouncement as to it."

2. *Procedural Aspects of the Case.* This suit was instituted by Respondent as a mandamus proceeding to compel Petitioner (as Chairman of the State Democratic Executive Committee of Alabama) to certify Respondent's name to the Secretary of State of Alabama, as a candidate for Presidential elector on the Democratic ticket. The Respondent had failed and refused to comply with the requirements for qualification as a candidate, including a failure and refusal to sign the required pledge. Nevertheless, the Circuit Court of Jefferson County, Alabama, awarded the mandamus prayed for, and the Supreme Court of Alabama affirmed on the grounds of unconstitutionality referred to above.

3. *Jurisdiction.* Jurisdiction of the Supreme Court to review this case on Petition for Certiorari rests upon 28 U.S.C., Sec. 1257 (3). Jurisdiction to issue the stay requested is granted by 28 U.S.C., Sec. 2101(f). Application for stay was made to the Supreme Court of Alabama, the Court below, and was denied on March 3, 1952, by Chief Justice J. Ed. Livingston.

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* The basic Alabama statute (Alabama Code, Title 17, Section 347) provides that "Every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein. . . ." Pursuant to this statute, the Alabama Democratic Executive Committee adopted a resolution setting forth qualifications for candidacy in the Democratic primary, including the pledge to support the party's nominees for President and Vice-President, already referred to above.

4. *The Reasons for Granting Certiorari.*

First: The case involves the constitutionality, under the Federal Constitution, of a procedure carrying out a state statute.

Second: The question decided below has not heretofore been decided by this Court.

Third: The decision below conflicts with, and jeopardizes, the historic policy of the Constitution and of this Court to commit to the State legislatures the procedure for the selection of electors.

Fourth: The decision of the Alabama Supreme Court conflicts with the election procedure established by statute in at least 21 states.

Fifth: The decision below conflicts with the procedure which has been established for more than 150 years and approved by this Court, whereby the electors perform a mere ministerial act, as agents of the voters who choose them, when they cast their ballots for President and Vice-President.

The five reasons for granting certiorari enumerated above speak for themselves. A few detailed aspects of the matter, however, merit brief discussion.

As has been indicated above, the Supreme Court of Alabama stated that the question which it decided "is a federal one, and there has been no authoritative pronouncement as to it."

Not only is the question a federal one, as stated by the Court below, but also it is a question which, in the form here presented, constitutes a substantial and important question of Constitutional law that has not heretofore been decided by this Court. Moreover, the decision of the Court below imperils the entire structure on which the two-party system in this country is based—for if it is to be true hereafter that a voter cannot have confidence that the elector for whom he casts his ballot will support the nominees of

the party to which the voter belongs, then the Court below has announced a new principle of Constitutional law which overturns the historic procedure whereby every President and Vice-President since George Washington has been elected. Further, it should be noted that the electoral procedure heretofore in effect has repeatedly been approved by this Court.

Thus, the decision below conflicts with statements of this Court that electors are chosen "simply to register the will of the appointing power in respect of a particular candidate." *McPherson* v. *Blacker*, 146 U. S. 1, 36 (1892).

Sixty-two years ago this Court said:

> "By the Constitution of the United States, the electors for President and Vice-President in each state are appointed by the State in such manner as its legislature may direct.... The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the Nation." *In re Green*, 134 U.S. 377, 379 (1890).

Furthermore, this Court has previously analyzed the history of the presidential election system and has concluded that the procedure for selecting electors was left "to the state legislatures...." *McPherson* v. *Blacker, supra.* Failure of this Court to protect the Petitioner and the Alabama procedure from attack through erroneous invocation of the Constitution will invite similar attacks upon the statutory electoral procedures of other states. This Court should not, by declining to take jurisdiction or by failing to grant the stay, make possible the culmination of the wrong committed by the Court below in the name of the Federal Constitution.

If, as held by the Court below, the nominating procedure adopted by Alabama Law violates the United States Constitution, it would seem to follow, based on a canvass of the laws of other states, that the statutory procedure employed in at least twenty-one states for the nomination and election of Presidential electors is invalid.

For the several reasons enumerated and discussed above, it is submitted that the issue here presented is a substantial federal question, not heretofore expressly decided, and the Supreme Court of the United States should grant a writ of certiorari in order that it may serve as the proper forum for the "authoritative pronouncement" referred to by the Supreme Court of Alabama.

5. *Reason for Requesting a Stay.* A stay is necessary in this case in order to protect the orderly election process authorized by a state legislature from court interference based on an erroneous interpretation and application of the United States Constitution.

Unless a stay is granted, the orderly election process established in Alabama pursuant to state statute will be disrupted. The Democratic primary in Alabama is scheduled to take place on May 6, 1952. The mandamus in this case, if not stayed, would compel the Petitioner to certify the Respondent's name to the Secretary of State for listing on the ballot as a Democratic candidate—and would compel Petitioner to so certify "not less than forty days prior to May 6, 1952." On or before March 27, therefore, unless the mandate below is stayed by this Court pending the action of this Court on the merits, Petitioner will be compelled by the order of the Court below to take a step which will inject confusion and chaos into the primary election scheduled to take place on May 6, through the placing of Respondent's name on the ballot, in the Democratic column, even though he has expressly refused to pledge himself to support the candidates selected by the National Convention of the Democratic Party.

Thus, a voter wishing to cast his ballot in the Democratic primary for a Presidential elector who will vote for the Democratic candidates for President and Vice-President will have no way of knowing, from the ballot itself, whether the candidates for elector listed in the Democratic column will in fact support the Democratic nominees for President and Vice-President. While a decision adverse to Petitioner

on the merits might lead to a similar result, certainly such a result should not be permitted to occur automatically through the failure to grant a stay.

A failure to grant the requested stay will also undermine the effectiveness of a related state election law. The Alabama Code (Title 17, Section 347) provides that authorization to vote in a party primary is limited to those who are "members of a political party entitled to participate in such primary election." The same provision of the Alabama Code provides that "Every state executive committee of a party shall have the right, power and authority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein. . . ." Accordingly, failure to grant the requested stay of mandate will not only make inevitable the chaos and confusion referred to above, but will also directly subvert the above-quoted provision of the Alabama Code.

On the other hand, the confusion and chaos referred to above can be wholly eliminated, if the judgment below be stayed as requested and this Court grants a prompt hearing on the merits. If this course is followed, the issue may be disposed of in ample time to permit an orderly primary election on May 6, 1952. See, e.g., *MacDougall* v. *Green*, 335 U.S. 281 (1948), which was argued on October 18, 1948, and decided on October 21, 1948, the judgment of the District Court having been entered on September 1, 1948, and the election which was the subject matter of that case being scheduled for November 2, 1948.

6. *Conclusion.* A certified copy of the opinion of the Court below is appended to this application.

The record in this proceeding has been filed with the Clerk of the Supreme Court of the United States; a petition for a writ of certiorari is in process of preparation and will be filed in the immediate future.

Wherefore, petitioner prays that the judgments and mandates of the courts below be stayed until final determination of the cause by the Supreme Court of the United States.

/s/ MARX LEVA
Counsel for Petitioner

APPENDIX "B"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 649

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

Reply to Respondent's Objection to Petitioner's Application for Stay.

Ben F. Ray, Petitioner herein, presents this brief statement in answer to the grounds presented by Respondent in his "objection".

I.

In Respondent's first objection, he argues that Ben F. Ray, as Petitioner, has no authority to apply to this Court for a writ of certiorari or for a stay of mandate. The short answer to this contention is that Respondent made Ben F. Ray, as Chairman of the State Democratic Executive Committee of Alabama, a party defendant to this cause in the

Circuit Court of Jefferson County, Alabama. As such party, Ray may proceed with his defense, including appeals to the Supreme Court of Alabama and the instant petition to this Court. This seems obvious.

In addition to the fact that it was Respondent himself who initially filed suit against Petitioner, it should be noted that the Alabama legislature has enacted statutes conferring broad authority upon "the state executive committee of each party." Thus, the basic Alabama election statute provides that "Every state executive committee of a party shall have the right, power and athority to fix and prescribe the political or other qualifications of its own members, and shall, in its own way, declare and determine who shall be entitled and qualified to vote in such primary election, or to be candidates therein . . . " Alabama Code, Title 17, Section 347, reprinted in Appendix "A" hereto.

Further, the basic election statutes of Alabama refer expressly to "The chairman of the state executive committee of each party" as the individual charged with the statutory responsibility of certifying to the Secretary of State of Alabama "the names of all candidates for nomination." See, e.g. Alabama Code, Title 17, Section 344, reprinted in Appendix "A" hereto.

Petitioner has authority pursuant to these statutes and the rules of the Democratic Party of Alabama to apply for a stay and for a writ of certiorari, if any such authority were needed in a case such as this where Ben F. Ray has already been made expressly a party defendant. The rules of the Democratic Party, attached hereto and made a part hereof as Appendix "B", designate the Executive Committee of the Party as the governing authority of the Democratic Party of Alabama. That Executive Committee in its Resolution of January 26, 1952, provided:

> "That if, in the opinion of the Chairman of this Committee, it becomes necessary or advisable for any further action to be taken in connection with such Primaries or the details pertaining thereto, the Chair-

man of this Committee is hereby fully authorized and empowered to act for and on behalf of the Committee.'"*

Respondent's contention on this point, if it had any validity, should have been raised in the Supreme Court of Alabama when Petitioner appealed to that Court. Respondent did not raise the point there. The point, if raised, would have had no merits there; it has no merit here.

II.

In Paragraph II of his objection, the Respondent asserts that the "decision and judgment of the Supreme Court of Alabama will not be reviewed by this Court" because, Respondent asserts, the Alabama decision "does not deny the constitutional right of any citizen", does not "aggrieve" the Petitioner, and involves a political question.

These arguments are in reality a single argument and are vulnerable to a short answer.

Respondent's contention ignores the plain wording of 28 U.S.C. 1257 (3). Section 1257 (3) gives this Court jurisdiction to review by writ of certiorari a final judgment or decree of the highest court of Alabama "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Respondent sets up a Federal Constitutional right to run as a candidate for Presidential and Vice-Presidential elector in the Democratic primaries of May 6 and June 3, 1952. In so doing he attacks the validity of that part of the Committee Resolution adopted January 26, 1952, which would bar him from such partici-

* This resolution is already part of the record filed in this Court pursuant to the petition for certiorari. As a matter of convenience, a copy of this resolution is attached to the instant statement as Appendix "C".

pation if he were unwilling to take a pledge to support the nominees of the Democratic National Convention. This Committee action was taken pursuant to Title 17, Section 347, Code of Alabama 1940, which empowers the Committee to set qualifications for participation as candidates in these primary elections. Thus, Respondent in effect attacks the validity of a State statute by attacking the validity of administrative action taken pursuant to a State statute.

In addition, Respondent most certainly claimed a "title, right, privilege or immunity" under the Federal Constitution.

The attack on the State statute has been made, and the right under the Federal Constitution has been drawn in question. This right was set up by Respondent. Petitioner may now ask this Court to decide whether the Supreme Court of Alabama correctly decided the Federal Constitutional question.

Respondent's argument that this Court is barred from exercising jurisdiction because the issue presented is a political one is paradoxical, since Respondent invoked the jurisdiction of the courts below to decide this question on the basis of the Federal Constitution. The Courts below did decide this question on the basis of the Federal Constitution, the Supreme Court of Alabama saying: "The question is a federal one and there has been no authoritative pronouncement as to it."

It seems clear that a political question is not involved in this case so as to constitute a bar to the exercise of jurisdiction by this Court. It is respectfully submitted that this Court so disposed of a similar contention in *McPherson* v. *Blacker*, 146 U.S. 1 (1892).

III.

In Paragraph III of his objection, Respondent asserts that he will be irreparably injured if his name is not printed on the ballot by April 6. If by this assertion Respondent means to suggest that this Court should take jur-

isdiction of the case and resolve the matter prior to April 6, we would welcome such expedited action. See, e.g., *MacDougall* v. *Green*, 335 U.S. 281 (1948).

However, we cannot agree with Respondent that he will be irreparably injured if the stay is granted and the case is still pending on April 6. Ballots can be reprinted after April 6 and prior to the May 6 primary, if that should be necessary—or special primaries can be held at any time prior to the national elections on November 6, if that should be necessary.

But there is another answer to Respondent's contention that either a stay or a judgment against him on the merits would cause him irreparable injury.

He cannot claim irreparable injury merely because he is denied the right to usurp the credentials of a candidate for the Democratic nomination when he has failed to satisfy the requirements established pursuant to state law for running in the Democratic primary. The only injury Respondent could possibly sustain would be a lack of permission to run on the democratic ticket. By agreeing to the qualifications established by the particular party, he can get his name on the ballot, without a day's delay, in the column of any party he intends to support. But he cannot, and should not, be permitted to run as a Democrat when he proclaims his intention of opposing the nominees of the Democratic party.

IV.

The litigation referred to in paragraph IV of Respondent's "objection" deals with eligibility to vote in a primary, and does not deal with eligibility to be a candidate in such a primary. This voter pledge litigation is of no moment in the case at bar. Even if the decision of the Circuit Court of Jefferson County, Alabama, were sustained by the Alabama Supreme Court in that case, the ballot pledge set forth in Title 17, Sections 350 and 352, Code of Alabama 1940, would remain. Since elector candidates were

nominees of the Democratic primary, it would still be a matter of extreme importance whether or not elector candidates were pledged to support the nominees of the National Democratic Convention.

In addition to his irrelevant reference to other litigation that is presently pending in Alabama, Respondent suggests that he will withdraw his name if this Court subsequently holds "that his name was improperly printed on the official ballot." This meaningless promise is, of course, completely beside the point. The mandamus order of the Alabama courts requires the Petitioner to certify the Respondent's name to the Secretary of State for inclusion on the ballot, on or before March 27, 1952. On or before that date Petitioner must certify the name in compliance with the mandamus order of the Alabama Courts. Clearly, such a situation calls for the granting of a stay, pursuant to the authority conferred on this Court by 28 U.S.C. Sec. 2101(f). We submit that this Court should not refrain from granting a stay on the basis of a meaningless promise by counsel for the Respondent, with respect to Respondent's future intentions.

Conclusion.

The decision of the Supreme Court of Alabama in this case was announced on February 29. On March 3 the Chief Justice of the Supreme Court of Alabama denied Petitioner's application for a stay. Petitioner's Application for Stay was filed in the Supreme Court of the United States on March 10. Respondent's "Objection to the Consideration of or to the Granting of the Application for Stay" was filed on March 14. The mandamus orders issued by the Alabama courts require Petitioner to certify Respondent's name to the Secretary of State of Alabama, as a candidate in the Democratic primary, unless a stay is granted by this Court prior to March 27. An important Constitutional law question is here presented, as the Supreme Court of Alabama has itself recognized. Further,

the time element lends great urgency to the Application for Stay.

Wherefore, for the reasons advanced in the Application for Stay and in this Reply, Petitioner prays that the judgments and mandates of the courts below be stayed until final determination of the case by the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX "C".

IN THE

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OCTOBER TERM, 1951

No. 649.

BEN F. RAY, As Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*

v.

EDMUND BLAIR, *Respondent*

Petitioner's Opposition to Respondent's Motion to Vacate.

Ben F. Ray, Petitioner herein, presents this brief statement in opposition to Respondent's Motion to Vacate the Stay granted by this Court on March 24, 1952:

1. The contentions presented by Respondent's Motion of March 24 do not differ in substance from the contentions that were before this Court when the Court entered its Stay Order of March 24.

2. In his Objection to the Granting of a Stay, as filed herein on March 14, Respondent contended that he would suffer irreparable injury "should the judgment of the Alabama Court be stayed beyond April 6, 1952." In our reply

to Respondent's Objection, we have already pointed out the fallacies in Respondent's claim that he will be irreparably injured—but even if his statement were to be taken at face value, it is the *April 6* date that he has heretofore claimed as the date of special significance to him. In view of the fact that this Court has granted both certiorari and a stay, and has scheduled oral argument for March 31 on both the merits and the stay, Respondent should not now be permitted to inject March 27, rather than April 6, as the crucial date.

3. Respondent will not be irreparably damaged by the granting of the stay for the reasons set forth in Petitioner's Reply to Respondent's Objection, at page 5.

Wherefore, Petitioner submits that Respondent's Motion to Vacate should be denied.

Respectfully submitted,

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